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80-5249

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-

Supreme Court, U. S.
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WILLIE N. REDDIX,

Petitioner,

-v.-

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

1. Whether the imposition of the death sentence upon petitioner on a finding of the aggravating circumstance that the offense was "especially heinous, atrocious or cruel," as construed and applied by the trial court and Supreme Court of Mississippi in this case, violates the Eighth and Fourteenth Amendment requirements for capital sentencing established by Godfrey v. Georgia, __ U.S. __, 64 L.Ed.2d 398 (1980)?

2. Whether a death sentence may be imposed consistent with the Eighth and Fourteenth Amendments to the United States Constitution upon one who has not taken life, attempted to take life, or intended to take life, especially where the sentencing jury was not instructed to consider those factors in mitigation of punishment?

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSISSIPPI

Petitioner Willie N. Reddix respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported at 381 So.2d 999 (Miss. 1980) and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on February 13, 1980. A timely petition for rehearing was denied on April 8, 1980. On June 24, 1980, Justice Powell granted petitioner's motion to extend the time to file this petition to and including August 14, 1980. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . . "

2. This case also involves the following provisions of the statutes of Mississippi:

§ 97-2-19. Homicide - murder defined-capital murder.

* * *

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

* * *

(e) When done with or without any design to effect death, by any persons engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

§ 99-19-101. Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

(1) Upon conviction or adjudication of guilt of a defendant of capital murder or other capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented as to

any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Mississippi. The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.

(2) After hearing all the evidence, the jury shall deliberate on the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5) of this section;

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6) of this section, which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) For the jury to impose a sentence of death, it must unanimously find in writing the following:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the jury imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings. If the jury does not make the findings requiring the death sentence, the court shall impose a sentence of life imprisonment.

(4) The judgment of conviction and sentence of death shall be subject to automatic review by the supreme court of Mississippi within sixty (60) days after certification by the sentencing court of entire record, unless the time is extended for an additional period by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) Aggravating circumstances shall be limited to the following:

(a) The capital offense was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of,or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy or the unlawful use or detonation of a bomb or explosive device.

(e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital offense was committed for pecuniary gain.

(g) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital offense was especially heinous, atrocious or cruel.

(6) Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

STATEMENT OF THE CASE

Petitioner Willie N. Reddix, a young black male, was convicted and sentenced to death for the December 2, 1974 murder of Arthur Weinberger.[1/] The seventy-seven year old Weinberger was knocked unconscious by petitioner's companion (R. 269) during the robbery of Weinberger's store, by four blows to the back of the head (R. 542), apparently with a wrench (R. 733). Weinberger died in the hospital a few hours later of cardiac arrest, never having regained consciousness (R. 543, 547). Petitioner's companion, Larry Jones, was tried separately for the murder, convicted and also sentenced to death. Jones v. State, 381 So.2d 983 (Miss. 1980).

The only direct evidence linking petitioner to the homicide[2/] was his confession to Officer Florian Tichell, a

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1/ Petitioner was originally tried in March, 1975. The conviction and death sentence resulting from that trial were vacated and a new trial was ordered by the Supreme Court of Mississippi in light of its opinion in Jackson v. State, 337 So.2d 1242 (Miss. 1976). Reddix v. State, 342 So.2d 1306 (Miss. 1977). Only the judgment reversing and remanding the case is reported. The full, unreported opinion is annexed hereto as Appendix B. The Jackson opinion declared that all defendants sentenced to death under the state's mandatory statute could be retried under procedures consistent with this Court's ruling in Gregg v. Georgia, 428 U.S. 153 (1976). Petitioner is here seeking review of the affirmance of the conviction and death sentence resulting from his second trial. A detailed comparison of the statute and the procedures spelled out by the Mississippi Supreme Court in Jackson is set forth in the petition for writ of certiorari filed with this Court on December 13, 1978, in Irving v. State, 361 So.2d 1360 (Miss. 1978), cert. denied, 441 U.S. 913 (1979) (Marshall, J., dissenting).

2/ There were no eyewitnesses to the murder and no fingerprints on the wrench. The State's evidence was directed toward proof that petitioner was a participant in the robbery. The

[cont'd.]

black officer who had known petitioner since he was a child R. 630, 703, 706). The confession was handwritten by the officer and signed by petitioner, who was only semi-literate at the time (R. 197, 200, 253, 274).[3] The confession reveals that petitioner was present when the victim was killed. Although petitioner admitted he and Jones had "a plan" in mind when they went to Weinberger's store, he did not indicate that the plan included any harm to Weinberger, let alone his murder. Petitioner acknowledged talking with Weinberger to keep him from seeing Jones, but his actions do not reveal an intent to do anything more than to allow Jones to steal some items and escape from the store unnoticed. During a hearing on a motion

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2/ [cont'd.]

State produced three witnesses who testified they saw one or more black males at or near the store carrying items similar to those shown to have been taken from the store (R. 512-13; 529; 559). None of the three could identify petitioner as one of the people they saw (R. 523; 530; 560). The State also called petitioner's aunt, Lula Mae Bell, to the stand. When she stated that she wanted to "take the 5th Amendment" (R. 406, 412), and denied remembering the substance of her testimony at petitioner's first trial (R. 410, 412, 459) the prosecutor was allowed to read her prior testimony into evidence (R. 464-480; 485-505), ostensibly for impeachment purposes. The prior testimony placed petitioner, Larry Jones, and petitioner's brother near the store at the time of the offense (R. 499, 500). Items identified as those stolen from the store were discovered at petitioner's mother's house, where both petitioner and his brother resided (R. 600-602; 658).

3/ The confession is attached hereto as Appendix C.

to suppress the confession, the prosecutor acknowledged that petitioner never struck the victim.[4] There was no evidence that petitioner was armed when he entered the store, and in fact the indictment against him was amended to make the charge murder in the commission of a robbery rather than an armed robbery (R. 5). There was also no evidence that petitioner even knew Jones was carrying the wrench, or was otherwise armed.[5]

The trial court refused to give two instructions at the guilt/innocence phase of the trial, requested by defense counsel, which would have addressed the issue of petitioner's lack of intent (R. 800, 802).[6] The court instead gave two

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4/ "Q. Well, I know you didn't hit Mr. Weinberger. I don't accuse you of that. You didn't hit him.

A. No sir.

Q. I know you didn't hit him. But you were there when he was hit.

A. Yes, sir."

(R. 269).

5/ One of the witnesses who testified to seeing the two young men carrying the stolen goods also testified to seeing these same males leaving a car apparently on their way to the store. He testified that he did not see either young man carrying a wrench, and would have noticed if they had been (R. 525-6).

6/ The instructions are attached hereto as Appendix D. The first would have allowed the jury to convict of murder rather than capital murder by finding that petitioner's intent was to shoplift, a felony not involving harm to the victim, rather than to rob. The other instruction would have required a verdict of not guilty if Jones' act was outside the common design he shared with petitioner.

confusing instructions requested by the State which allowed the jury to convict of capital murder upon finding that either petitioner or Jones possessed an intent to kill the victim.[7] The verdict returned by the jury was a general one, (R. 757) and thus did not expressly find petitioner had any intent to murder.

After a brief sentencing phase, the judge instructed the jury to consider three statutory aggravating factors: (1) whether the offense was committed while petitioner was engaged in the crime of robbery; (2) whether the offense was especially heinous, atrocious or cruel; (3) whether the petitioner had previously been convicted of a felony involving the use or threat of violence to the person (R. 781, 814). While the jury was instructed that it could consider any mitigating circumstances surrounding petitioner's "life and character" or the "commission of the offense" it was instructed as to only one specific mitigating circumstance -- petitioner's age (R. 814-15).[8] The phrase "heinous, atrocious or cruel" was nowhere defined, nor was the jury instructed on the other statutory mitigating circumstances which were applicable to petitioner's case,[9] including

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7/ The instructions are attached hereto as Appendix E.

8/ The relevant instructions at the sentencing phase are attached hereto as Appendix F.

9/ There is evidence in the record that petitioner is mentally retarded and in 1975 was psychotic. It is not clear whether this information was before the jury, but the psychiatric reports containing the information were before the Supreme Court of Mississippi on appeal (R. 18-20). Counsel at trial and on appeal did not focus on the failure to instruct on the mental disturbance mitigating circumstance but rather the failure to instruct regarding petitioner's lack of intent to commit murder.

Miss. Code Ann. §99-19-101(6)(d):

> The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

Defense counsel objected to the instruction, and requested the jury be instructed according to the statute as the Supreme Court of Mississippi's Gray decision required. Gray v. State, 351 So.2d 1342 (Miss. 1977).[10/] The jury returned a verdict of death, finding the three aggravating circumstances enumerated in the instructions to exist, and finding that "the mitigating circumstances do not outweigh the aggravating circumstances" without designating what mitigating circumstances were found or considered (R. 783-4, 819).

10/ Petitioner was tried after Gray, supra, in which the Supreme Court of Mississippi ordered all trials conducted subsequent to the date of the decision to follow Miss.Code Ann. §99-19-101 rather than the Jackson procedure. Id. at 1349. The trial judge was unsure which of the two standards to apply, and so invented a hybrid of the two.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. In his appeal brief, petitioner urged as Assignments of Error I, VII, and VIII, that his penalty trial was conducted in a manner that violated the Constitution and that his sentence of death was excessive, disproportionate and imposed under the influence of passion, prejudice or other arbitrary factors. Brief of Appellant, at 5; 21-22. The Mississippi Supreme Court, noting that it had reviewed the record for errors assigned and those not assigned, Reddix v. State, 381 So.2d 999, 1013 (Miss. 1980), rejected petitioner's contentions. Id. at 1005, 1011, 1013. The reviewing court found that the proceedings under which petitioner had been sentenced survived constitutional attack, Reddix v. State, supra, 381 So.2d 1004. The court also found the death sentence to have been imposed without the influence of passion, prejudice or any other arbitrary factors. Id. at 1013. Finally, the court found that the evidence supported the jury's findings as to aggravating and mitigating circumstances. Id. [11/]

11/ In support of his motion for a new trial, addressed to the trial court, petitioner had urged that "the verdict of the jury in the sentencing phase was against the weight of the law and the evidence." (R. 827). This motion was denied. (R. 848).

In his petition for rehearing, petitioner specifically urged to the Mississippi Supreme Court that "as applied by the jury in this case, that provision that the crime was especially heinous, atrocious or cruel is unconstitutionally vague and overbroad under the eight [sic] amendment to the United States Constitution," citing this Court's grant of certiorari in Godfrey v. Georgia, Brief in Support of Petition for Rehearing at 3. The petitioner noted that not only had the trial judge failed to provide any definition of this aggravating circumstance to the jury, but the Mississippi Supreme Court had also "failed to distinguish which killings might necessarily qualify for the death penalty (id. at 2). The petition for rehearing was denied without opinion.

2. On appeal to the Mississippi Supreme Court, petitioner argued that the instructions to the jury at the sentencing phase of the trial were unconstitutional, in part, because they precluded adequate consideration of petitioner's minor level of participation in the offense and lack of specific intent to commit murder. Reddix v. State, supra, 381 So.2d at 1005, 1010; Brief of Appellant at 7, 20. Petitioner also argued that the sentence of death in this case was excessive and disproportionate based on petitioner's minor participation and lack of intent and in comparison with other cases. Brief of Appellant at 22-5; Rebuttal Brief of Appellant at 2-5. Petitioner cited to Lockett v. Ohio, 438 U.S. 586 (1978), and specifically the concurring opinion of Mr. Justice White.

In its opinion affirming petitioner's conviction and sentence of death, the Supreme Court of Mississippi stated: "What [mitigating circumstances in addition to age] appellant would have had the jury consider do not appear . . . . [A]ppellant could have presented evidence of lack of murder intention on his part." Reddix v. State, supra, 381 So.2d at 1005. The Court further stated that "the jury was much more favorably instructed than was required under section 99-19-101." The court then addressed the proof of lack of intent, dismissing the claim because "nobody said" petitioner did not intend to cause the death of the victim, and the record showed petitioner diverted the victim's attention from Jones. Id. at 1010.

After passing on the merits of the issue, the court stated that "the Court may not be put in error," because no request for an instruction on petitioner's minor level of participation had been made. Id. at 1011. The record clearly reflects, however, that petitioner objected to the instructions at sentencing on the ground that "it fails to follow the holding in the case of Gray v. State of Mississippi, Cause No. 50,159 in the Supreme Court of the State of Mississippi." (R. 782-3), which would have required instructions in accordance with Miss. Code Ann. § 99-19-101. The statute includes the mitigating circumstance of a defendant's minor level of participation in the offense. Miss. Code Ann. § 99-19-101(6)(d). In his motion for new trial, petitioner claimed error in that "the Court failed to sustain

Defendant's Objection to the instruction S-3 of the sentencing phase." (R. 827). At hearing on the motion for new trial, petitioner argued the failure to instruct on the mitigating circumstances in the statute (R. 834). The trial court denied the motion on the ground that the instruction as given did not prejudice the petitioner (R. 845), not on the ground that no proper objection had been made at trial.

Finally, the court rejected petitioner's disproportionality argument holding that "[i]t was not necessary that appellant have any design to effect the victim's death, while appellant was engaged to [sic] the commission of the crime of robbery" id. at 1011 and that petitioner's diversion of the victim's attention "was as much a part of Jones' bludgeoning the victim as if appellant had physically restrained him," id. at 1012. The court characterized the killing as "planned and deliberate" and therefore found petitioner to be as culpable as any of the perpetrators in the court's prior cases. Id.

In his Brief in Support of Petition for Rehearing, petitioner argued that the court erred in contending petitioner had a plan to injure the victim, id. Brief on Rehearing at 6, and in comparing his case to "triggermen" cases for purposes of proportionality review, id. at 8.

REASONS FOR GRANTING THE WRIT

I.

THE IMPOSITION OF A SENTENCE OF DEATH ON PETITIONER UPON A FINDING OF THE AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE WAS "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL," AS CONSTRUED AND APPLIED BY THE TRIAL COURT AND THE SUPREME COURT OF MISSISSIPPI IN THIS CASE, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT STANDARDS FOR CAPITAL SENTENCING ESTABLISHED BY GODFREY V. GEORGIA.

In Godfrey v. Georgia, __ U.S. __, 64 L.Ed.2d 398 (1980), this Court held that aggravating circumstances such as "especially heinous, atrocious or cruel" cannot be the basis of a constitutional death sentence where no restrictive interpretation of the circumstance is conveyed to the jurors by instructions that "suitably direct and limit" the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action," at least where the circumstance is not defined and circumscribed by judicial interpretation on appeal and there is no evidence that the crime involved "torture," "aggravated battery," or other behavior lying "at the core" of the aggravating circumstance. Godfrey v. Georgia, id. at 405-407 (plurality opinion).

In the instant case, one of the aggravating circumstances found by the jury was that the offense was "especially heinous, atrocious or cruel" pursuant to Miss. Code Ann. § 99-19-101 (5)(h) [hereafter cited as § (5)(h)] (R. 819). There was no limiting instruction placed on § (5) (h) by either the trial or appellate court, and the facts of the case establish

that there is no evidence supporting a finding that would come within a properly construed §(5)(h).[12] Accordingly petitioner's sentence of death must be reversed.

Although the trial judge submitted this aggravating circumstance to the jury in his instruction, he did not define it. (R. 814). In so doing, the trial court failed to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'"[footnotes omitted].

The trial judge charged the jury in the words of the statute alone (see p. 4, supra), which "standing alone, . . . [implied no] inherent restraint on the arbitrary and capricious infliction of the death sentence." 64 L.Ed.2d at 406. The words "heinous," "atrocious," and "cruel," even more vague than "outrageously or wantonly vile, horrible and inhuman,"[13] could fairly be used to characterize any murder

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12/ This case clearly does not involve torture, aggravated battery, or other "core" behavior. The victim died shortly after he was struck, without ever regaining consciousness. (R. 543-547). Unlike Godfrey, this case does not involve a multiple murder. Nor is there any evidence that the victim was in fear of harm before he was struck (indeed, he was totally unaware of his assailant's presence) or that the murder caused "a gruesome spectacle" in the store. See 64 L. Ed.2d at 409 n.16 (plurality opinion); id. at 419 (White, J., dissenting).

13/ See Ga. Code Ann. § 27-2534.1(b)(7), upheld in Gregg v. Georgia, 428 U.S. 153 (1976).

by persons of "ordinary sensibility." Id. As this Court noted in Godfrey,

> Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the statutory section's] terms. In fact, the jury's interpretation of [statutory section] can only be the subject of sheer speculation.

Id. at 406-07. Based on the trial court's failure to give proper limiting instructions to the jury at the penalty trial, petitioner's death sentence cannot stand.

The Mississippi Supreme Court took no action to cure the trial court's omission and likewise failed to apply any limiting construction to § (5)(h) in its review of the case on appeal and petition for rehearing.[14/] Indeed, the Mississippi Supreme Court had soundly rejected an invitation to do so in an earlier case, because of its judgment that

> the average jury in its sound discretion and judgment understands the generally accepted meaning of [those] words and is able to apply [them] to different factual situations without further definition . . . . Washington v. State, 361 So.2d 61, 66 (1978)(emphasis added).

See also Coleman v. State, 378 So.2d 640, 648 (Miss. 1979), where the Mississippi Supreme Court followed Washington. Similarly, in all cases coming before the Mississippi Supreme Court, where the defendant was prosecuted under the statute at issue, and the § (5)(h) aggravating circumstance found,

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14/ It is noteworthy that the Mississippi court denied the petition for rehearing, notwithstanding this Court's grant of certiorari in Godfrey.

the court has routinely affirmed the death sentences without any limiting construction. See, Washington v. State, supra; Voyles v. State, 362 So.2d 1236 (Miss. 1978); Gray v. State, 375 So.2d 994 (Miss. 1979); Culberson v. State, 379 So.2d 499 (Miss. 1979); Jones v. State, 381 So.2d 983 (Miss. 1980); Reddix v. State, supra.[15/]

The opinion of the Mississippi Supreme Court is devoid of any real analysis of the facts of the instant case as they relate to § (5)(h). It is clear from the facts that a finding of the existence of the § (5)(h) aggravating circumstances was completely unwarranted, see n.12, supra. Further, the fact that the jury found two other aggravating circumstances to exist in no way vitiates petitioner's claim.[16/] This Court has

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15/ Unlike the courts of Georgia and Florida, the Mississippi Supreme Court has not met its "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey 64 L.Ed.2d at 406. See also, Georgia cases cited therein at nn. 10 and 14, and Gregg v. Georgia, supra 428 U.S. at 202 n.54, 205. In Proffitt v. Florida, 428 U.S. 242, 255 (1976), this Court sustained a statutory aggravating circumstance identical on its face to the one challenged here, but only as it had "been construed by the Supreme Court of Florida." The plurality recognized that, as commonly understood, the phrase "heinous, atrocious or cruel" would apply to "all killings," id. at 255-56, quoting Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The Mississippi Supreme Court has simply not kept § (5)(h) "within constitutional bounds." Godfrey, 64 L.Ed.2d at 407.

16/ The statute requires that the jury find "sufficient aggravating circumstances exist as enumerated in subsection (5) . . . . " Miss.Code Ann. §99-19-101(3)(a). From this section it is clear that while one or more aggravating circumstances is enough to permit a death sentence, no particular number of aggravating circumstances requires a death sentence. Thus, each and every aggravating circumstance which the jury finds may tip the delicate balance, and the part played by any single aggravating circumstance which the jury found "can only be the subject of sheer speculation." Godfrey, 64 L.Ed.2d at 407.

invariably applied the rule that any ambiguity as to whether a judgment rests upon a constitutionally unsound footing requires its reversal. See, e.g., Stromberg v. California, 283 U.S. 359, 367-368 (1931); Williams v. North Carolina, 317 U.S. 287, 291-292 (1942); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Bachellar v. Maryland, 397 U.S. 564, 570-571 (1970).[17/] As this Court recently noted, "these fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." Presnell v. Georgia, 439 U.S. 14, 16 (1978). If anything, they apply with added force, because of the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(plurality opinion).

Petitioner's death sentence rests inseparably on the jury's finding of the "heinous, atrocious or cruel" aggravating circumstance. Because that finding was the result of "the uncontrolled discretion of a basically uninstructed jury [that] was in way cured by the [Mississippi] Supreme Court" (64 L.Ed. 2d at 407, plurality opinion), this Court should grant certiorari to consider whether petitioner's death sentence should be vacated in light of Godfrey.

17/ Doubts about how the jury's sentencing deliberations were affected by the defective instructions given in this case "should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948). See also, Sandstrom v. Montana, 442 U.S. 510, 526 (1979).

II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A DEATH SENTENCE MAY BE IMPOSED CONSISTENT WITH THE EIGHTH AND FOURTEENTH AMENDMENTS UPON ONE WHO HAS NOT TAKEN LIFE, ATTEMPTED TO TAKE LIFE, OR INTENDED TO TAKE LIFE, ESPECIALLY WHERE THE SENTENCING JURY IS NOT INSTRUCTED TO CONSIDER THOSE FACTORS IN MITIGATION OF PUNISHMENT.

Petitioner's case squarely presents the question reserved by this Court in Lockett v. Ohio, supra, 438 U.S. at 609 n. 16 (1978): whether a sentence of death may constitutionally be imposed on one who has not taken life, attempted to take life or intended to take life, under circumstances where the jury charged with imposing punishment is not instructed to consider those factors in mitigation of sentence.

It is uncontested that petitioner did not wield the wrench that killed the victim. (R. 269) There was no proof at trial that petitioner was armed or knew his companion Jones to be armed before they entered the store. Although petitioner's confession states that he and Jones had formed a "plan" before going downtown to the victim's store, (R. 217), his statement and his actions do not reveal an intention to do anything more than to distract the victim to allow Jones to steal some items and escape unnoticed. Neither the jury's general verdict on conviction, nor its findings on sentencing contain an express finding that petitioner, rather than Jones, "possessed a purpose to cause the death of the victim." Lockett v. Ohio, supra at 624 (White, J. concurring).[18/]

18/ Indeed, there is less evidence of an awareness that one of the participants in the plan would be armed than there was in

The Court has held that the unique and extreme penalty of death is not per se excessive or disproportionate where the condemned person has deliberately taken another's life. Gregg v. Georgia, supra, 428 U.S. at 187 (1976), but that it "is an excessive penalty for the rapist who, as such, does not take human life," Coker v. Georgia, 433 U.S. 584, 598 (1977). The principle to be derived from these holdings is that it is constitutionally inappropriate for a state to extinguish the life of an offender who has not deliberately extinguished the life of his victim. While at least one member of the Court has explicitly so stated, Lockett v. Ohio, supra, at 627 (White, J. concurring), the Court has thus far refrained from expressly deciding the issue.

The Court has indicated that the appropriate measure for determining whether a sentence is disproportionate or excessive is whether it comports with the "evolving standards of decency" reflected in contemporary community judgments on the propriety of a particular sentence. Gregg v. Georgia, supra, 408 U.S. at 173, Coker v. Georgia, supra, 433 U.S. at 592. The petitioner in Lockett presented a study of all executions for homicide since 1954 for which facts were available. Lockett v. Ohio, supra, Brief for Petitioner, at 66 and App. B.; 438 U.S. at 624-5 and n. 6 (White, J. concurring). That study indicated that "only eight [out of 363] clearly involved individuals who did not personally commit murder." Id. Two of those eight had

---

18/ (Cont'd.) Lockett where there was considerable testimony that Sandra Lockett participated in formulating a plan which included obtaining a gun at the store and loading it. Lockett v. Ohio, supra at 590.

had hired others to do the killing. Id. at 625 n. 7. Two people have been executed since that study was conducted and both of them were the assailants in the offense.[19/] The statistics for the State of Mississippi contained in the Lockett study further reflect the community judgment that a person who has not killed should not be put to death: of the people executed since 1954, not a single person was executed for homicide where he was not personally, physically responsible for the death of the viction.

A study of all the cases decided by the Supreme Court of Mississippi since the State's mandatory statute was found unconstitutional reveals that petitioner is the only person sentenced to death without being the actual perpetrator of the homicide. (A list of these cases is set forth in Appendix G.) The Mississippi Supreme Court recognized as much in its decision. (Reddix v. State, supra, 381 So.2d at 1012: ". . . there is no death sentence of one not physically acting or assisting in the killing as is the situation here"). Thus, from either a national or state perspective petitioner's death sentence is excessive and disproportionate, and its imposition, therefore, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

Furthermore, it is clear that under Justice White's view, a death sentence may not be constitutionally imposed without

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19/ John Spenkelink was executed on May 25, 1979. The facts of his case are reported in Spinkellink v. State, 313 So.2d 666 (Fla. 1975). Jesse Bishop was executed on October 22, 1979. The facts of his case are reported in Bishop v. State, 597 P.2d 273 (1979).

an express finding "that the defendant engaged in conduct with the conscious purpose of producing death. Lockett v. Ohio, supra, 438 U.S. at 628 (White, J., concurring). Unless the jury responsible for the sentencing decision is informed that such a finding is necessary, and such a finding appears unambiguously in the record the imposition of a death sentence cannot stand.[20] Where a jury is not instructed at the penalty phase to consider the petitioner's level of culpability or the nature of his mens rea in the offense, and the verdict on guilt is ambiguous as to its findings on these issues, it cannot be maintained that the Eighth Amendment requirement as articulated by Justice White has been met.[21]

The Court should grant certiorari to address these

20/ The need for an unambiguous holding is mandated not only under ordinary due process requirements, Stromberg v. California, supra, 283 U.S. at 367-368, and the Eighth requirement for heightened reliability in death cases as well. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, ___ U.S. ___ 48 U.S.L.W. 4801, 4804 (June 20, 1980)

21/ Additionally, the Court has held that in order for a death sentence to be constitutionally imposed, the jury responsible for the decision must have its discretion guided and channeled in such a way as to ensure consistent application of the death penalty. Gregg v. Georgia, supra, 428 U.S. at 193, 195; Godfrey v. Georgia, supra. The Court has not clarified, however, whether a general instruction on the jury's ability to consider evidence in mitigation, without defining "mitigation" or directing the jury's attention to evidence presented in mitigation, is sufficient to guide and channel the jury's discretion. Thus, even if Justice White's view that a jury finding of intentionality is constitutionally necessary is rejected, the issue would remain whether a death sentence may be imposed where the instructions to the jury or mitigation are as amorphous as they were in petitioner's case, failing to focus the jury's attention on the "critical issue in the punishment phase of the trial" of petitioner's mens rea. Green v. Georgia, 442 U.S. 95, 97 (1979).

interrelated questions directly and explicitly to insure that its mandates in Lockett and Gregg are followed by the States, and to avoid the imposition of the irreversible sentence of death in cases where it is disproportionate and excessive.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Willie N. REDDIX

v.

STATE of Mississippi.

No. 50999.

Supreme Court of Mississippi.

Feb. 13, 1980.

Defendant was convicted before the Circuit Court, Harrison County, Jack B. Weldy, J., of capital murder and was sentenced to death, and he appealed. The Supreme Court, Cofer, J., held that: (1) even if certain court decisions and statutes had resulted in vagueness and lack of clarity in regard to rights of defendants to prove mitigating circumstances, defendant could not complain in light of trial court's sentencing instruction permitting consideration of certain factors as mitigating circumstances; (2) evidence supported finding that defendant's confession was voluntary; (3) defendant could not assert that admission of testimony in regard to wrench used in the murder was error where evidence in regard to wrench was first interjected into the record by defendant; (4) admission of evidence of defendant's convictions occurring subsequent to murder offense as evidence of aggravating circumstances was not error; (5) trial court did not err in giving certain instructions on mitigating circumstances; (6) death penalty was not shown to have been imposed under influence of passion, prejudice or other arbitrary factors; and (7) the death sentence was not disproportionate to penalty imposed in similar cases.

Affirmed.

1. Homicide ⇐354

Even if certain court decisions and statutes had resulted in vagueness and lack of clarity in regard to rights of defendants to prove mitigating circumstances during sentencing phase of capital cases, a defendant, who was convicted of capital murder and was sentenced to death could not complain in regard to such vagueness and lack of clarity, in light of fact that sentencing instruction permitted consideration of age of defendant at time of crime, any mitigating circumstances or combination of mitigating circumstances surrounding his life and character and any mitigating circumstances or combinations of mitigating circumstances surrounding commission of the offense. Code 1972, §§ 97-3-19(2)(e), 99-19-101, 99-19-103.

2. Criminal Law ⇐531(3)

In proceeding in which defendant was convicted of capital murder and was sentenced to death, evidence did not warrant a conclusion that defendant's concern about his brother was used by officers to overreach defendant and lead him to an involuntary confession, but, rather, the evidence supported the finding that confession was voluntary. Code 1972, § 97-3-19(2)(e).

3. Criminal Law ⇐1037.2

Refusal to sustain motion for mistrial due to prosecuting attorney's references to a prior trial of defendant involved no error in criminal proceeding where defendant did not request that jury be instructed to disregard the testimony after overruling of the motion and renewed motion.

4. Criminal Law ⇐1137(5)

Defendant, who was convicted of capital murder, could not assert that admission of testimony in regard to wrench used in the murder was error where the matter of the location of wrench and its identification as having been used in robbery were matters injected into the record by defendant on cross-examination. Code 1972, §§ 97-3-19(2)(e), 99-19-101, 99-19-103.

5. Homicide ⇐354

In proceeding in which defendant was convicted of capital murder and was sentenced to death, admission of evidence of defendant's convictions, which occurred subsequent to the murder offense, as evidence of an aggravating circumstance was not error. Code 1972, §§ 97-3-19(2)(e), 99-19-101(5)(b).

6. Criminal Law ⇐814(3)
Homicide ⇐311

In proceeding in which defendant was convicted of capital murder and was sentenced to death, trial court did not err in instructing jury that any mitigating circumstances or combination of mitigating circumstances surrounding defendant's life and character and surrounding the commission of the offense with which he was charged were for jury's consideration; giving unrequested instructions that it would be a mitigating circumstance if defendant had no specific intent to cause death of victim and if defendant was an accomplice whose participation was relatively minor would have been improper, in that they would have been contrary to the proof. Code 1972, §§ 97-3-19(2)(e), 99-19-101.

7. Criminal Law ⇐1038.3

Court cannot be put in error for failure to instruct if there had been no request for the instruction.

8. Homicide ⇐354

Death penalty imposed against defendant, who was convicted of capital murder, was not shown to have been imposed under influence of passion, prejudice or other arbitrary factors, though the same jury, which, at guilt phase of the trial, had seen photographs of victim and heard testimony in regard to victim's wounds and wrench used in the offense, was used during the sentencing hearing. Code 1972, §§ 97-3-19(2)(e), 99-19-105.

9. Criminal Law ⇐1206(2)

Death sentence for capital murder offense committed during robbery by defendant, who had been previously convicted of felony involving use or threat of violence to a person, was not disproportionate to penalty imposed in similar cases, even though defendant was only 18 years of age at time of the murder offense and even if he did not have any design to effect victim's death during the robbery. Code 1972, §§ 99-19-101(1), 99-19-105.

Hawkins & Henry, Joe Ben Hawkins, W. Eugene Henry, Biloxi, J. W. Miller, Rolling Fork, for appellant.

A. F. Summer, Atty. Gen. by Marvin L. White, Sp. Asst. Atty. Gen., Jackson, for appellee.

Before the Court En Banc.

COFER, Justice, for the Court.

Appellant Willie N. Reddix, Larry Jones (Jones), and John Durango Reddix, Reddix' brother (J. D.) were indicted at the Febru-

ary 1975 term of Circuit Court of the Second Judicial District of Harrison County, of the capital murder of Arthur Weinberger, on December 2, 1974, then the owner and operator of "Art's Levis" (Art's) on Howard Avenue in Biloxi. The indictment charged that the crime was that denounced in Mississippi Code Annotated, Section 97-3-19(2)(e), (Supp.1979), which defines capital murder in this case in the following language:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> * * * * * *
>
> (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies.

Appellant was tried on this indictment in 1975, and was convicted and sentenced to suffer the death penalty. He was eighteen years old at the occurrence. Heeding the shadows on the validity of our statutes on capital punishment as cast in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), this Court rendered its opinion in *Jackson v. State*, 337 So.2d 1242 (Miss.1976), holding all persons under death sentence prior to the *Jackson* decision must be retried, and setting out guidelines therefor, including the holding of bifurcated trials, one on guilt of the indictee, and, if found guilty, another on the sentence to be imposed.

Under the *Jackson* case, the 1975 conviction of Reddix was reversed, by an unpublished opinion on March 2, 1977, and remanded for new trial. 342 So.2d 1306 (Miss.1977).

The cause went to trial again in December 1977 being tried in the two phases, resulting in conviction of capital murder and death sentence, and the case is now again before us.

The proof in the case is largely undisputed, but will be noticed here in appropriate detail.

During the later morning of December 2, 1974, Ovell McGee was engaged in a landscaping tractor-driving operation beside a mall on Magnolia Street, near a parking lot, to the south of Howard Street in Biloxi. He testified that a white Cadillac automobile occupied by three black males was driven into the parking lot. Two of the three occupants emerged from the vehicle, and went north along Magnolia Street to Howard Avenue, almost a block away. The third occupant, the driver, stayed in the car which remained parked there until the two others returned about twenty-five to thirty minutes later, one approaching from one way, carrying a footlocker, and wearing ragged-topped combat boots; the other one had a leather jacket coat on his shoulder when he returned. The bearer of the footlocker put it in the car, the two of them got in the car, and they drove away.

Raumond Real was employed in a jewelry store a few doors from Art's on Howard Avenue, and was returning from lunch, when he observed a black man carrying a footlocker, handling it as if it were heavy; the man turned left (southeast) off Howard on to Reynoir; Real drove around to park his automobile, and came across the man in an alley still with the footlocker.

Preston Sullivan had testified in the first trial, reversed and remanded, as above shown, but had become deceased since. His earlier testimony was read into the record [Mississippi Code Annotated, section 13-1-111 (1972)], wherein he said he had been in Art's before December 2, 1974, and went in it about 11:30 a. m. on that date, and as he was approaching the store, he observed on the street a black man, wearing a watchcap, and having a navy peacoat slung over his shoulder, and wearing army fatigue trousers. He entered the store and saw Arthur Weinberger lying in a doorway to an office; he was lying on his back; and there was blood in a puddle around his head. The witness went to another place of business and caused the police to be called; then, thinking of the man dressed as above coming out of the store, he went back across

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the street and all he could see "was that little green cap just for a second and then it disappeared."

Dr. Bazzone, a neurological surgeon, testified to the victim's condition when he had been brought to a hospital emergency room, a bruise over his eye, about four cross-shaped wounds on the left side of the back of his head, some bone fracture, and appeared to be alive but unconscious. The hospital record showed the victim was seventy-seven years old. It was the physician's medical opinion that the victim had died from head injuries which caused damage to his brain resulting in his decease. The victim died at 4:36 p. m. that day.

Having obtained a search warrant therefor, Robert Payne, in charge of the criminal investigation division of the Biloxi Police Department, searched the home of Annie Lee Reddix, appellant's mother, where appellant and J. D. also resided, and found a locked footlocker with merchandise in it, and also a pair of combat boots with ragged or fringed tops on them. On these boots were stains that appeared to be blood spots. Mrs. Lerline Blanq, on, and for three or more years preceding, December 2, 1974, was manager of Art's Levis Store, and possessing a very high degree of familiarity with the store's merchandise, returned to the store on that day, after her lunch break, about twelve noon, found the store and merchandise in a state of disarray, and the victim beaten and bleeding. She examined the footlocker and merchandise in it, when it had been taken on the search warrant, and identified them as having been taken from Art's; she testified to money on hand, in process of being prepared for deposit when she left for lunch, and its not being there when she returned.

Lula Bell, aunt of appellant, had testified for the state in the earlier reversed trial, as well as several other times in hearings on this case and its companion case or cases. When called as a witness, she undertook to invoke the protection of the Fifth Amendment to the United States Constitution. Out of the presence of the jury, the state went over her former testimony and was met with denials or failure of memory as to her earlier proof. She was held by the court to be a hostile witness, whereupon her testimony was largely a confrontation with her answers in the earlier record. She had known appellant all his life; knew J. D.; had seen Larry Jones, the third co-indictee, about three times; she did not know where Art's Levis was located except that it was on Howard Avenue; and she had known the victim for a number of years and had traded with him. She was in the area of the store the morning of December 2, 1974, but did not remember saying it was between nine-thirty and ten a. m., nor that her first stop was Betty Gary's, a store across the street near Art's; nor that she entered that store by the side entrance. She did not remember how long she was in Penney's; but she came out on Howard Avenue; she did not remember having testified that she saw appellant when she came out of Penney's or that he was running east pretty fast on Howard Avenue, on the side where Art's was located, or that he had a dark coat on his shoulder. She did not remember her earlier testimony that there was no doubt in her mind about it being appellant whom she saw.

Appellant's confession signed by him, subject of one of the assignments of error, was admitted into evidence, as follows:

I, Willie Reddix, was at my home on the 2nd of December, 1974, and Larry Jones was at my home. Larry is also known as Catfish. J. D. Reddix was not there at this time. He did not know anything about the plan that Larry and I had in mind. When J. D. came home, we asked him to give us a ride uptown. He took us uptown and parked in the lot behind the place that used to be Bradley's Cleaners. Larry Jones and I got out of the car, but my brother, J. D. Reddix, did not get out of the car. This was about 10:45 a. m. Larry and I walked uptown for about five or ten minutes. Then I, Willie Reddix, went into Art's Levi Store, and I began to question the man about a coat. He showed me a couple of coats, and he had his back turned to the door.

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About this time, Larry Jones, came in the store. I kept talking to the man to keep him from seeing Larry. For about the next three seconds, Larry hit the man about three times with a Stilson wrench. Then I ran to the door to keep a watchout. I had no idea that the man was dead. Larry drug the man into the office. We gathered all the goodies. Larry took shirts and pants and hats and put them in a footlocker. I was at the door watching all the time. Larry said, "I can't get the cash register open." So I opened it for him. At this time I went in the office to see was Mr. Art dead, but he was still breathing, so I put his coat under his head, and then we left the scene. Larry carried the footlocker out of the store. Larry went to the left, on Croesus Street, and I went east on Howard Avenue. I was carrying a black jacket in my hand which I had took from the store. We met back at the car. J. D. was still in the car. Larry put the footlocker in the backseat of the car and he sat in the back seat. I got in the front seat. I gave the jacket to J. D. and told him, "Here is a jacket." J. D. did not ask us where we had been or where we got the things from. The only thing he said was "What you all got?" and I told him to just drive. We went home and parked the car in front of my house, and Larry took the footlocker into my house. When I opened the cash register, we both took the money out. I got about fifty dollars, and I got one silver dollar. After we got home, we laid low for the rest of the day. All J. D. got was the coat I gave him. We did not tell him what we had done. The gun was not used in the holdup that Larry had, just the Stilson wrench.

We now reach the assignments of error. They are:

I.

THE PROCEEDINGS UNDER WHICH THE APPELLANT WAS TRIED CONSTITUTE A VIOLATION OF THE UNITED STATES CONSTITUTION.

II.

THE TRIAL COURT ERRED BY FAILING TO SUSTAIN THE APPELLANT'S MOTION TO SUPPRESS HIS CONFESSION.

III.

THE TRIAL COURT ERRED BY FAILING TO SUSTAIN THE APPELLANT'S MOTION FOR A MISTRIAL FOR REFERENCES MADE BY THE PROSECUTING ATTORNEY TO A PREVIOUS TRIAL OF THE DEFENDANT.

IV.

THE COURT ERRED BY ALLOWING INTO EVIDENCE TESTIMONY OF A WRENCH RECOVERED BY OFFICER TICHELL.

V.

THE STATE SHOULD NOT HAVE BEEN ALLOWED TO PRESENT EVIDENCE OF CONVICTIONS THAT OCCURRED SUBSEQUENT TO THE OFFENSE FOR WHICH THE APPELLANT WAS ON TRIAL.

VI.

STATE'S INSTRUCTION NO. 3 SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY.

VII.

THE DEATH PENALTY WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR OTHER ARBITRARY FACTORS.

VIII.

THE SENTENCE OF DEATH IS EXCESSIVE AND DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES, CONSIDERING BOTH THE CRIME AND THE APPELLANT.

[1] Appellant maintains that "the proceedings under which the appellant was

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tried constitute a violation of the United States Constitution."

This argument has been made in multiple cases and found to be without merit. *Irving v. State*, 361 So.2d 1360 (Miss.1978); *Washington v. State*, 361 So.2d 61 (Miss. 1978); *Bell v. State*, 360 So.2d 1206 (Miss. 1978).

The assignment brings into review the entire trial procedure and we are to notice the sentencing phase, also, in disposing of the assignment.

What appellant perceives to be an apparent conflict between the *Jackson* decision, *supra*, and Mississippi Code Annotated, Sections 99–19–101 and 99–19–103 (Supp.1978), is used as basis for confusion as to rights of defendants to prove mitigating circumstances. The *Jackson* decision says, in part:

> At this hearing, [the sentencing phase] the defendant may prove his lack of a prior criminal record as a mitigating circumstance and may also adduce proof of any other circumstance or combination of circumstances surrounding his life and character or the commission of the offense with which he is charged that would be reasonably relevant to the question of whether he should suffer death or be sentenced to life in prison.

(337 So.2d at 1256).

On April 13, 1977, Sections 99–19–101 and 99–19–103 took effect. Section 99–19–101 provides, as to the sentencing phase:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances.
>
> . . .
>
> [and]
>
> (6) Mitigating circumstances shall be the following:
>
> (a) The defendant has no significant history of prior criminal activity.
>
> (b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (c) The victim was a participant in the defendant's conduct or consented to the act.
>
> (d) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.
>
> (e) The defendant acted under extreme duress or under the substantial domination of another person.
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> (g) The age of the defendant at the time of the crime.

Appellant points further to the fact that after the *Jackson* decision and the effective date of Sections 99–19–101 and 99–19–103, (April 13, 1977), and just before he was put to trial again after reversal, the decision in *Gray v. State*, 351 So.2d 1342 (Miss.1977), was rendered wherein note was taken of the new statutes, and the Court said that "[j]uries shall be instructed in accordance with the statute in all trials after April 13, 1977, the effective date of the statute." (351 So.2d at 1349).

He says that "the last sentence gave the new statute retroactive effect forcing the trial court not only to apply the vague directions of *Jackson*, but also the provisions of the new statute. The effect of this was to remove from consideration of the jury and to disallow the court to instruct the jury regarding several mitigating factors which might have been permissible under the *Jackson* decision."

In the *Washington* case above, 361 So.2d 61, 68 (Miss.1978), this Court declared itself to be "committed to the 'individualized consideration of mitigating factors' in each case, and that the only limitation placed on the introduction of evidence of mitigating circumstances is that it must be *reasonably relevant*." (Emphasis already there.)

Even if the *Jackson* decision were vague and unclear, and even if the statutes and the *Gray* decision above tend further to make for vagueness and lack of clarity, neither of which we find to be true, we are of the view that appellant may not com-

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plain, for he was given instructions liberally extending to him the benefit of these factors as mitigating circumstances in the state's own sentencing instruction:

(1) The age of the defendant at the time of the crime.

(2) Any mitigating circumstances or combination of mitigating circumstances surrounding his life and character.

(3) Any mitigating circumstances or combination of mitigating circumstances surrounding the commission of the offense with which he is charged.

What circumstances appellant would have had the jury consider do not appear. As argued by the state, under the mitigating principles in the instruction granted, appellant could have presented evidence of lack of murder intention on his part.

We will examine the mitigating circumstances to which testimony was given hereinafter.

Appellant cites and urges the weight of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), but we distinguished it in *Washington v. State, supra*.

In addition to what we have said, effort has been made in several of our decisions under the statute here controlling to procure review by the United States Supreme Court, only to have certiorari denied by that Court.

[2] Appellant's second assignment of error attacks the trial court's failure to sustain his motion to suppress his confession.

The crime of which appellant was accused took place on December 2, 1974. About the tenth of December 1974, appellant was in the Jackson County Jail on other charges, and had given a fictitious name. How it was discovered is not clear from the record, but, about that date, Captain Florian Tichell of the Biloxi Police Department, investigating the Art's crime, accompanied by Sergeant Chester of the Biloxi Police Department, went to the Jackson County Jail at Pascagoula, and talked to appellant about the Art's case, asking him if he was involved in the crime, telling him that J. D. was involved in it, and asking him if he knew anything about it, which he denied. After about a half-hour conversation, the officers left.

On December 14, 1974, Tichell and Officers Chester and Hamilton brought appellant from the Jackson County Jail to the Biloxi Jail. Tichell booked him. During this contact and journey, Art's case was not discussed with appellant. On December 15, 1974, Tichell asked him for a statement and he told Tichell that, if he had anything to tell him, he would do so the next morning.

On the morning of December 16, 1974, the appellant executed a written waiver of his *Miranda* rights:

CONSENT TO SPEAK AND WAIVER OF RIGHTS

I, Willie Reddix, Age 18, Date of Birth 7/30/74 [sic] residing at 467 East Davison St. in the City of Biloxi state of Miss. have read this statement of my rights/have had my rights read to me by Capt. Tichell who has identified himself to me as a member of the Biloxi Police Department. I understand what my rights are and I am willing to make a statement and answer questions. I do not want a lawyer at this time, I understand and I know what I am doing. No threats or promises have been made to me, and no pressure or coercion of any kind has been used against me.

SIGNATURE: /s/ Willie Reddix Date: 7/16/74
Time: 11:32 A.M. Place: Biloxi Police Department

He, thereupon, gave and signed the confession quoted at length hereinabove at the beginning of which appears the following:

Willie N. Reddix, of the age of 18, residing at 467 East Davison St., City of Biloxi, County of Harrison, State of Miss., have been advised of my rights by Capt. Tichell, of the Biloxi Police Department as follows: Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you

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during questioning. You have this right to the advice and presence of a lawyer. If you cannot afford a lawyer, one will be appointed for you at no expense to you. If you wish to answer questions now, without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer. I have further been warned and advised that I do not have to make a statement of any kind or character whatsoever, nor do I have to incriminate myself in any way. Further, I have been advised that in the event I do make a statement that the same may be used against me in any court.

After being so advised and cautioned, I do hereby expressly waive my rights to counsel and his advice, and do hereby make the following voluntary statement, freely, without any fear or threat having been made to me, and without any promises of reward of any kind and with the knowledge that this statement that I now make may be used against me on any trial or trials for the offense or offenses concerning the matter which the following voluntary statement is made; that as stated, this statement is made of my own free will without any promise of reward, without any fear or threat of any kind having been made to me, and without any coercion, and without any leniency or offer of leniency being made to me by any person whomsoever.

* * * * * *

I further state that I have read this entire statement, initialed all corrections, and signed this statement in the presence of the below listed witnesses, and that it is correct and true as written.

/s/ Florian Tichell
(Signature)
Capt. Biloxi Police
(Title and/or Address)
/s/ Charles Krise
(Signature)
Major B. P. D.
(Title and/or Address)

/s/ Willie Reddix
(Signature)
467 East Division St.
(Address)

Following the preliminaries next above, Reddix made the statement hereinabove quoted, to Tichell alone. Appellant would not make any statement if a third person were present, and others were excluded from the conversation. The record is replete with evidence that he was given his *Miranda* rights on more than one occasion including this meeting wherein and just before the confession was made.

Appellant says the primary objection to the confession was that it was not free and voluntary because of fears and promises made to him. In the motion to suppress, he said there were no threats, promises, or duress, and Tichell testified to the same. Appellant said Tichell "just told me that he would see what he could do for me," but he did not promise anything. He further testified that the only reason he gave the statement was to free J. D. from "a lie that they had put on him. He wasn't involved in it."

He testified that the officers told him J. D. was charged with capital murder, and they would put him in the gas chamber if found guilty. This testimony is contradicted. Tichell, in rebuttal, also gave evidence that he made no promises to appellant concerning appellant or J. D.

It seems apparent from the record that appellant was concerned about J. D. and what might happen to him, as well he should have been. The record will not support a conclusion that this earnest concern was used by the officers to overreach him and lead him to an involuntary confession, or that it had that result.

The decision in *Agee v. State*, 185 So.2d 671 (Miss.1966), collates certain rules relative to confessions and the taking and use of them.

The State has the burden of proving the voluntariness of a confession. This burden is met by the testimony of an officer, or other person having knowledge of the facts, that the confession was voluntarily made without any threats, coercion, or offer of reward. This makes out a prima facie case for the State on the question of voluntariness. *Lee v. State*, 236 Miss. 716, 112 So.2d 254 (1959). When objection is made to the introduction of the confession, the accused is entitled to a preliminary hearing on the ques-

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tion of the admissibility of the confession. This hearing is conducted in the absence of the jury. *Lee v. State*, supra, is also authority for the proposition that when, after the state has made out a prima facie case as to the voluntariness of the confession, the accused offers testimony that violence, threats of violence, or offers of reward induced the confession, then the State must offer all the officers who were present when the accused was questioned and when the confession was signed, or give an adequate reason for the absence of any such witness.

See also *Holmes v. State*, 211 Miss. 436, 51 So.2d 755 (1951).
(185 So.2d at 673).

In *Clemons v. State*, 316 So.2d 252 (Miss. 1975), the rule was also stated:

This conflicting evidence presented a question of fact to be determined by the trial judge who was in the best position to observe the witnesses as they testified. We have consistently held that where evidence is conflicting on the question of whether a confession was voluntarily made, that the issue is to be determined by the trial court, and upon review, this Court will not disturb the trial court's finding unless it appears to be contrary to the evidence. *Ivey v. State*, 246 Miss. 117, 149 So.2d 320 (1963).
(316 So.2d at 253).

The rules from the *Agee* decision *supra*, were all met in the advance inquiry into the validity of the confession, and the trial judge resolved all conflicts in favor of the voluntariness and admissibility of it. We are of the view that his decision is supported by, and not contrary to, the evidence, and the assignment of error that the motion to suppress should have been sustained is not well taken.

[3] Appellant's third asserted error is in the trial court's failure to sustain his motion for a mistrial for references made by the prosecuting attorney to a previous trial of the defendant. Lula Mae Bell, whose testimony has been hereinabove summarized, had testified in the earlier trial of appellant on this charge, reversal of which case has also been set out hereinabove. The witness, appellant's aunt, could not remember earlier testimony, after she had been found to be hostile to the state. Using the record of her testimony in the first jury trial, the district attorney was cross examining her, in the course of which there was this exchange:

Q. Do you remember, Mrs. Bell, my asking you if you saw Willie Reddix in the court room, and you said, "Yes, I do, back on the date you testified here in March of 1975."

A. I remember that.

Later there was this question or statement by the district attorney:

Q. That's all I'm asking you. I know it's hard on you testifying against your nephew but you've done it before, and I'm just telling you to tell the truth.

At the first of these exchanges, appellant made a motion for mistrial, and at the last one, the motion was renewed, and when the motion was overruled each time it was made, there was no request that the jury be instructed to disregard the testimony and therefore no error. *Clanton v. State*, 279 So.2d 599 (Miss.1973).

Appellant relies upon *Strong v. State*, 199 Miss. 17, 23 So.2d 750 (1945). In that case the defendant had gone into testimony as to another case described as being that of a similar nature to the one on trial, and, as the district attorney was making his argument to the jury, the defendant objected, and the court, noting the defendant had opened the door to the argument, overruled the objection and instructed the jury to consider the present case on its own facts. Assigned as error on appeal, this Court said:

As a general rule it is incompetent and improper to either prove the result of a former trial, or comment thereon, before the jury on a subsequent trial, and that for several obvious reasons . . . (citing authorities). But the question is whether it was reversible error, or error at all, under the peculiar circumstances of this case. We do not think it was

reversible error for these reasons: The question had been opened up and gone into by appellants. The exact status of that litigation was left up in the air before the jurors. It was before them that a former trial had been had on the same charge and the jurors, or some of them, might well have been confused as to how it affected their duties and powers.
(199 Miss. 27, 23 So.2d at 752).

Miller Transporters, Ltd. v. Espey, 187 So.2d 876 (Miss.1966), was a second trial after reversal in this Court. The mandate on that reversal was introduced in evidence. There was objection thereto and its introduction was assigned as error, on the ground that appellant's rights were prejudiced thereby. This Court disagreed because appellant had "opened the door." We further observed, however:

> The general rule is that opinions and mandates of appellate courts are not proper evidence in the retrial of a cause of action. This is so because the opinion or mandate may advise the jury or comment upon the evidence. *Strong v. State*, 199 Miss. 17, 27, 23 So.2d 750 (1945); 88 C.J.S. *Trial*, § 179 at p. 349 (1955). However, in the instant case, the mandate does not review or comment on the evidence in the former trial, and under these circumstances, we cannot say that permitting the mandate to be shown to the jury requires a reversal in this case. *Strong v. State*, supra.
> (187 So.2d at 877).

We fail to find error in this assignment. Having done so, the further observation is made that, although we know Harrison County is densely populated, highly progressive, and with many matters and activities occupying the minds of its people, we are unable to attribute to the jury in this case a degree of naivete that would cause on its part an unawareness of the earlier trial, conviction, and reversal, but would know of it arising, if not earlier, from the voir dire testing of their qualifications to sit as jurors, and the fact that Lula Mae Bell had testified before in a case apparently with facts similar to these (although she was the state's first witness.)

[4] The fourth assignment of error arises from the court's allowing into evidence of testimony of a wrench recovered by Officer Tichell.

Appellant's confession, held hereinabove properly admitted in evidence, had shown Jones wielded a Stilson wrench in the murder of the victim. Tichell, who took the confession, was on cross examination, when these questions were asked and answered:

Q. And you would also agree that Willie told you that Larry hit the man three times with a Stilson wrench?

A. Yes, sir.

Q. That was what Willie told you on that date?

A. Yes, sir.

* * * * * *

Q. Willie also told you about a Stilson wrench, did he not?

A. Yes.

Q. Did you ask him any further questions about that Stilson wrench?

A. Not that day, no.

Q. Did you ask him on another occasion about the Stilson wrench?

A. Yes, after I recovered the wrench, I asked him about it.

Q. After you recovered the wrench?

A. Yes.

Q. Where did you recover the wrench?

A. I recovered the wrench from a Mr. Harris on Nixon Street.

Q. When did you recover that?

A. Oh, about maybe one day, maybe two days later.

Q. What did you ask Willie about the wrench?

A. When I recovered the wrench, I asked Willie was that the wrench. He identified that as being the wrench that was used.

BY MR. HENRY: We would ask that the jury be excused at this time.

The jury was excused, and there was further questioning, and discussion between

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counsel as to a stipulation earlier made which might keep the wrench (and the testimony about it) from being in this record. The jury returned to the courtroom, and the state, on redirect, asked Tichell the question:

Q. What did the defendant tell you about the wrench?

A general objection was made by the appellant, which was sustained as to the form of the question. The wrench was made an exhibit for identification, and later an objection was sustained to the state's offer of it and some other exhibits already in the record for identification. Hence, it was never admitted into evidence.

From what we have just quoted and delineated from the record it is seen that the matter of the location of the wrench and its identification as being that used in the robbery were matters first injected into the record by appellant on cross examination, and whatever damage there was to appellant's defense was done, or largely done, by appellant. Without further citation of authority the *Strong* and *Miller Transporter* decisions *supra* are a complete answer to this self-made error and the state did not cause it at all.

Appellee's brief quotes from *State v. Apple*, 121 N.C. 584, 28 S.E. 469, 470 (1897): "If the defendant goes fishing in the state's waters, he must take such fish as he catches."

We conclude that appellant may not assert this as error.

[5] Appellant assigns as his fifth error that the state should not have been allowed to present evidence of convictions that occurred subsequent to the offense for which the appellant was on trial.

The offense, the basis for the indictment herein, took place on December 2, 1974. In March 1975 appellant was convicted and sentenced in this case. An appeal was taken to this Court. On November 20, 1975, he entered pleas of guilty to two charges of armed robbery and two charges of kidnapping in the Circuit Court of Jackson County. On March 2, 1977, this Court reversed the conviction and sentence in this cause, and remanded the cause for new trial. The new trial took place in December, 1977, and in that trial proof of his conviction on guilty pleas of armed robbery and kidnapping was introduced in evidence during the sentencing phase. Appellant objected to this proof "on the grounds that these are offered under an ex post facto statute."

Section 99-19-101(5)(b) (1979 Supp.) lists as one of the limited number of aggravating circumstances which may be proven in the sentencing phase of a capital murder case,

(b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

This question arose in the companion case of *Jones v. State*, 381 So.2d 983 (Miss. 1980), and it was there said:

Another problem which deserves comment arose in the sentencing phase. The lower court admitted evidence of an armed robbery conviction of the appellant entered after the December 2, 1974, murder of Weinburger. This conviction was affirmed on appeal in a per curiam opinion. *Jones v. State*, 340 So.2d 17 (Miss. 1976).

Among the aggravating circumstances available for consideration in capital cases under Mississippi Code Annotated section 99-19-101 (Supp.1979), subsection (5)(b) is that: "The defendant was *previously* convicted of another capital offense or of a felony involving the use or threat of violence to the person." (Emphasis added). In employing the word "previously", the statute designates no time frame. The question arises as to whether the legislature meant previous to the commission of the capital offense or previous to the trial for it.

We conclude the legislature intended to relate the word "previously" to the time of trial, so that a conviction between the time the capital offense was committed and the time of trial for it may be admitted into evidence as an aggravating circumstance. We think this, because a

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wide leeway is permitted the appellant to offer mitigating circumstances in avoidance of the death sentence, while an extremely limited type of behavior may be offered by the state in seeking capital punishment. In our opinion, the legislature undoubtedly intended a weighing of both at the time of sentencing so the past behavioral patterns likely to affect the defendant's future behavior might be evaluated by the jury in deciding whether the defendant will live or die. We think there is no more justification for terminating consideration of the defendant's criminal behavior at the time of the offense than there is for terminating consideration of favorable behavior at that time. All go to the question of whether the most severe punishment will serve a legitimate social purpose untainted by vindictiveness.

Thus, we have committed ourselves to a position contrary to appellant's present assertion of error.

[6] In the sixth place, appellant says state's instruction No. 3 (on the sentencing phase) should not have been submitted to the jury.

In the sentencing phase of the case, the state showed as aggravating circumstances two pleas of guilty and sentences on indictments charging appellant with kidnapping and two pleas of guilty and sentences on indictments charging appellant with armed robbery, all in the Circuit Court of Jackson County. (These, as shown hereinabove, were crimes committed after the fatal assault on the victim in this case.)

Following the proof by the state next above, appellant produced James Wren, the Harrison County Sheriff's jailer for the Second District of that county, who testified that he had known appellant in the jail, and knew his general reputation for peace or violence and it was good. On cross examination, he said all he knew was what he had learned in six months of acquaintance with appellant from people in the jail, and that what he was saying was that appellant had not given him any trouble.

Appellant brought his mother to the stand, and she, Annie Lee Reddix, testified that he had gone to the eighth grade in school.

As his final witness in the sentencing phase, appellant brought Richard Spencer, Harrison County Deputy Sheriff, assigned to the Second District Jail at Biloxi, who testified that, as to appellant's reputation for peace or violence, some say one thing and others say another, but that they had no trouble with him at the jail.

On mitigating circumstances, two instructions were given, the appellant requesting none.

The burden of appellant's argument here is that the court should have given more precisely, and in more detail, mitigating circumstances and that there are degrees or various weights of circumstances, and that one circumstance may be sufficient to outweigh all opposing circumstances in the record. As we treated this instruction early in this opinion, the jury was much more favorably instructed than required under section 99-19-101. The jury was instructed that "any mitigating circumstances or combination of mitigating circumstances surrounding his life and character" and "any mitigating circumstances or combination of mitigating circumstances surrounding the commission of the offense with which he is charged," were for its consideration.

Appellant maintains that there should have been spelled out as mitigating circumstances, for instance, that appellant had no specific intent to cause the death of the victim, but nobody said he did not, and the record shows he purposely diverted the victim's attention until his accomplice could deliver the fatal blows. He further argues that appellant was an accomplice whose participation was relatively minor, but this, too, is contrary to the proof which showed him on an equal footing with Jones in the crime.

In addition to the absence of a record supporting these asserted mitigating circumstances, appellant could have requested an instruction embodying them, and then, if refused, assigned the refusal as error.

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[7] Under *Newell v. State*, 308 So.2d 71 (Miss.1975), for failure to instruct without specific request therefor, the Court may not be put in error as here undertaken. *Voyles v. State*, 362 So.2d 1236 (Miss.1978), certiorari denied, 441 U.S. 956, 99 S.Ct. 2184, 60 L.Ed.2d 1059 (1979); *Washington v. State*, 361 So.2d 61 (Miss.1978); certiorari denied, 441 U.S. 916, 99 S.Ct. 2016, 60 L.Ed.2d 388 (1979); *Irving v. State*, 361 So.2d 1360 (Miss.1978); certiorari denied, 441 U.S. 913, 99 S.Ct. 2014, 60 L.Ed.2d 386 (1979); *Jordan v. State*, 365 So.2d 1198 (Miss.1979); certiorari denied, —— U.S. ——, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979).

In the *Lockett* decision *supra*, appellant quotes in support of his thesis the following:

> We conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.
>
> (Emphasis not by us).
>
> (438 U.S. at 604, 98 S.Ct. at 2965, 57 L.Ed.2d at 990).

We are of the view that the trial, including the instruction attacked, complied well with this requirement.

[8] The seventh assignment of error is that the death penalty was imposed under the influence of passion, prejudice or other arbitrary factors.

Basis for this assignment is threefold: (1) the gruesome pictures admitted in evidence; (2) Dr. Bazzone's description of the victim's wounds; and (3) the Stilson wrench testimony noticed in assignment of error No. 4 above.

Appellant cites no authority, but we notice his arguments nevertheless. In addition to citing no authority it is evident in the record that there was no objection to the pictures or to the physician's rather detailed description of the wounds, emergency treatment of them, and their being the cause of his death. Appellant also complains that Dr. Bazzone's testimony established the cause-of-death element of the corpus delicti.

We recognize that pictures can be gruesome and repelling. There comes to mind no picture portraying wounds such as here present that might be pleasantly attractive. We have consistently held that the competency, relevancy, and materiality of photographs are within the sound discretion of the trial judge, who will also determine whether such pictures have legitimate evidentiary purpose or value. This holding extended to the death penalty cases of *Voyles v. State*, *supra*, and *Irving v. State*, *supra*.

We have sufficiently dealt with, and disposed of, the Stilson wrench testimony, now here again argued.

It is argued, also, that the use of the same jury in both the guilt phase and the sentencing hearing was prejudicial to appellant, this jury, at the guilt stage, having heard Dr. Bazzone's testimony and the Stilson wrench evidence, and having seen the photographs of the victim. Section 99-19-101(1) provides for use of the same jury for both hearings, although it does not necessarily so mandate. There was no objection to this procedure nor was there request that another jury hear the sentencing case.

We find this assignment to be without merit.

[9] Appellant's eighth and final assignment is that the sentence of death is disproportionate to the penalty imposed in similar cases, considering both the crime and the appellant.

It was not necessary that appellant have any design to effect the victim's death, while appellant was engaged to the commission of the crime of robbery. He and Jones, his accomplice, had a plan for and in what they were about. It is argued that the record does not show what the plan was. The poet said that the best study of mankind is man, and Holy Writ says, "By their fruits ye shall know them." There is no showing in this record that anything unan-

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ticipated occurred, to throw them off balance or to change their course. Holding the victim's attention from Jones was as much a part of Jones' bludgeoning the victim as if appellant had physically restrained him while his head was being crushed.

In *Culberson v. State*, 379 So.2d 499 (Miss.1979), this Court unanimous in its decision of guilt, said:

> Presently, we can say without doubt the appellant schemed and participated in the unlawful undertaking which resulted in death. The subjunctive nature of the intention to kill makes it no less deliberate and no less deserving of capital punishment than if it had been expressed, in our opinion. The felon who causes death in furthering his crime manifests a callous disregard for human life, because he subordinates the life of the innocent to his desire for gain, thereby inviting the outrage of a society understandably bent upon protecting itself from physical violence.

Price v. State, 362 So.2d 204 (Miss.1978), while it involved a party found guilty and sentenced to life imprisonment in a bifurcated hearing in a capital murder case, states again the law in this way:

> It is also familiar law that when two or more persons act in concert, with a common design, in committing a crime of violence upon others, and a homicide committed by one of them is incident to the execution of the common design, both are criminally liable for the homicide. *McNeer v. State*, 228 Miss. 308, 87 So.2d 568 (1956). The fact that the accused did not fire the fatal shot does not relieve him from criminal responsibility for the death of Mrs. Green who was slain by the accused's confederate in carrying out the common design to rob. *Carrol v. State*, 183 Miss. 1, 183 So. 703 (1938).
> (362 So.2d at 205).

The *Lockett* case, *supra*, involved the conviction of a party to a murder in connection with a robbery. The convicted person was not in the shop when the shop owner was killed. The conviction was reversed, not because there was shown no intent on her part, but rather because, in the opinion of the United States Supreme Court, the Ohio statute under which she was convicted improperly limited the permissible mitigating factors, not including defendant's minor role among the partners in the crime.

By mandate of the statute we have reviewed the following capital murder cases: *Jones v. State*, 381 So.2d 983 (Miss.1980); (companion case to this one); *Culberson v. State*, 379 So.2d 499 (Miss.1979); *Gray v. State*, 375 So.2d 994 (Miss.1979); *Jordan v. State*, 365 So.2d 1198 (Miss.1979); *Voyles v. State*, 362 So.2d 1236 (Miss.1978); *Price v. State*, 362 So.2d 205 (Miss.1978); *Irving v. State*, 361 So.2d 1360 (Miss.1978); *Washington v. State*, 361 So.2d 61 (Miss.1978); *Bell v. State*, 360 So.2d 1206 (Miss.1978); *Nealy v. State*, 354 So.2d 78 (Miss.1978); and *Hill v. State*, 339 So.2d 1382 (Miss.1976). In these cases there is no death sentence of one not physically acting or assisting in the killing, as is the situation here. Neither is it true that there was one planned and executed in more deliberate fashion than the one now before us.

In the companion case, *Jones v. State*, 381 So.2d 983 (Miss.1980), the majority of this Court affirmed the death sentence and mandated its execution. An examination of the appeal record in that case reveals these differences between that case and this one:

(1) The district attorney's argument before the jury wherein he made a comment that probably bore upon appellant Jones' failure to testify.

(2) The Jones jury, after 2¼ hours of deliberation, reported to the Court that it could not reach a unanimous verdict. "What shall we do?" Thereupon, the Court was recessed until the next morning.

(3) Jones was a borderline to mentally retarded man.

(4) There was no confession in that case.

(5) No eye witness testified in that case.

(6) J. D. (the co-indictee with this appellant and Jones), took a sentence for a lesser crime and for a shorter incarceration and was one of the main witnesses for the state.

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These infirmities in the Jones trial are not present here, and we consider that guilt here present is much more strongly established here than in Jones' case.

Considering the crime and the appellant, we do not conclude that the death sentence is excessive and disproportionate to that imposed in similar cases.

Hence, we fail to find merit in any of the asserted errors.

Under Mississippi Code Annotated, section 99-19-105 (Supp.1978), automatic appellate review of this case is necessary on our part, and we have reviewed the record on the errors assigned and in search of errors not assigned.

In doing so, we have considered the punishment prescribed by the sentencing phase jury, and have next above recorded our view and conclusions relative thereto. We find the death sentence not to have been imposed under the influence of passion, prejudice, or any other arbitrary factors; that the evidence supports the jury's finding that the aggravating circumstances are not outweighed by the mitigating circumstances, and that the death sentence is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The jury's verdict signed by the foreman thereof is as follows:

> We the jury unanimously find from the evidence and beyond reasonable doubt that the capital murder in this case was committed while the defendant was engaged in the commission of the crime of robbery; that the capital offense was especially heinous, atrocious and cruel; and that the defendant has been previously convicted of a felony involving the use or threat of violence to the person. We further find unanimously from the evidence and beyond a reasonable doubt that after weighing mitigating circumstances and the aggravating circumstances, one against the other, that the mitigating circumstances do not outweigh the aggravating circumstances and that the defendant should suffer the penalty of death.

We affirm the conviction and sentence and set the 19th day of March, 1980 as the date for execution of the sentence.

AFFIRMED.

PATTERSON, C. J., SMITH, and ROBERTSON, P. JJ., and SUGG, WALKER, BROOM, LEE and BOWLING, JJ., concur.

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APPENDIX B

IN THE SUPREME COURT OF MISSISSIPPI

NO. 49,454

WILLIE N. REDDIX

8250

V.

STATE OF MISSISSIPPI

THIS OPINION IS NOT FOR PUBLICATION

COURT FROM WHICH APPEALED:	CIRCUIT COURT, HARRISON COUNTY
TRIAL JUDGE:	CIRCUIT JUDGE J. RUBLE GRIFFIN
ATTORNEYS:	APPELLANT JOE BEN HAWKINS W. EUGENE HENRY APPELLEE A. F. SUMMER, ATTORNEY GENERAL BY: BEN H. WALLEY, ASSISTANT ATTORNEY GENERAL
CHARGE AND SENTENCE:	CAPITAL MURDER - DEATH
DISPOSITION:	REVERSED AND REMANDED

BEFORE PATTERSON, ROBERTSON AND BROOM

PATTERSON, PRESIDING JUSTICE, FOR THE COURT:

Willie Reddix was convicted in the Circuit Court of Harrison County for capital murder and sentenced to death. Prior to trial a separate jury was empaneled to determine Reddix' then present ability to aid counsel in his defense. The jury found appellant sane and subject to trial.

In Jackson v. State, 337 So.2d 1242 (Miss. 1976), this Court considered the constitutionality of capital punishment under Mississippi law and held that all persons condemned to death prior to Jackson, as was Reddix, must be retried and resentenced. This being true, the appeal now focuses upon the propriety of the hearing conducted

on the issue of present sanity thus obviating any need to discuss the facts concerning this brutal crime.

Appellant contends the state failed to prove him sane beyond a reasonable doubt, the applicable burden, for the reason that the only issue before the jury was present sanity. Specifically, the bulk of the state's evidence dealt with Reddix' mental condition from childhood until approximately one year before trial, apart from the lay testimony of police officers, whereas appellant's evidence, consisting of reports on his then current mental condition, one prepared by a psychologist, the other by a psychiatrist, showed him to be insane.

In Wilson v. State, 243 Miss. 859, 864, 140 So.2d 275, 277 (1962), a "sanity trial" was conducted prior to that on a criminal charge, this Court holding the object of such an inquiry to be, "[W]hether the appellant was, at that time, of such mental capacity as to be able to consult with his counsel and make a reasonable defense." Continuing, the Wilson Court quoted Smith v. State, 95 Miss. 786, 49 So. 945 (1909), as follows:

> . . . "Where the defense is insanity, general or partial, the door is thrown wide open for the admission of evidence; every act of the party's life is relevant to the issue and admissible in evidence" . . . . (243 Miss. at 864, 140 So.2d at 277)

Regarding the quality of the state's witnesses, in McCarrh v. State, 249 Miss. 247, 257, 148 So.2d 494, 497 (1963), this Court said:

> [T]he rule in this state, with reference to the admission of opinions of nonexperts on the question of sanity or insanity, is that such opinions are admissible, if accompanied by a statement of the facts on which they are based, whenever the witness had such acquaintance or opportunity for observation as is likely to make the opinion valuable.

Consequently, a jury may disregard the conclusion of the defendant's expert witnesses and accept the testimony of the state's lay witnesses. Hollins v. State, 340 So.2d 438 (Miss. 1976).

Although the verdict of the jury finding Reddix sane at the time of his trial was not contrary to the evidence or law, such should not be interpreted as conclusive of his ability to consult with counsel and make reasonable defense at his ensuing trial because of the possible variance in his mental condition from the past trial until the impending one.

Jackson, supra, requires appellant's conviction of capital murder to be reversed for new trial under current procedures.

REVERSED AND REMANDED.

GILLESPIE, C.J., INZER, P.J., SMITH, ROBERTSON, SUGG, WALKER, BROOM AND LEE, JJ., CONCUR.

APPENDIX C

BILOXI POLICE DEPARTMENT
BILOXI, MS.

INTERROGATION AND INVESTIGATION

Complaint 12331

Date 12/16/74

Time 1135 AM

ISSISSIPPI
HARRISON

illie M. Reddix, Of the age of 17, ,

t 467 East Jemison St., City of Biloxi,

Hancock State of Miss., Have

sed of my rights by Capt. Tisdale, Of the Biloxi

partment as follows: Before we ask you any questions, you must understand your
You have the right to remain silent. Anything you say can be used against you in
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ve him with you during questioning. You have this right to the advice and presence
yer. If you cannot afford a lawyer, one will be appointed for you at no expense to
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tatement of any kind or character whatsoever, nor do I have to incriminate myself in
Further, I have been advised that in the event I do make a statement, that the same
sed against me in any court.

ing so advised and cautioned, I do hereby expressly **waive** my rights to councel and
ce, and do hereby make the following voluntary statement, freely, without any fear
having been made to me, and without any promises of reward of any kind and with
wledge that this statement that I now make may be used against me on any trial or
or the offense or offenses concerning the matter which the following voluntary
t is made; that as stated, this statement is made of my own free will, without any
of reward, without any fear or threat of any kind having been made to me, and
any coercion, and without any leniency or offer of leniency being made to me by any
homsoever.

Willie Reddix was at home on the 2nd of Dec 1974.
d Larry Jones was at my Home Larry is also
own as (Cat Fish). J.D. Reddix was not there at
his Time. He did not know anything about the plan
nt Larry and I had in mind. When J.D. came
me we asked him to give us a Ride uptown.
e took us uptown and parked in the lot behind
he place that used to be Bradleys elevens.
Larry Jones and I got out of the car. But my Brother
J.D. Reddix did not get out of the car.
This was about 10.45 AM.
Larry and I walked up town for about 5 or ten
minutes. Then I Willie Reddix went into Arts Levi
store. And : Began To Question . a man about a coat
He showed me a couple of coats and he and his back
Turned To the door.
About this time Larry Jones came in the store
. To the side To Keep him From seeing

lc

W.R.

ON 12/11/74

R.

R ABOUT THE NEXT 3 SECONDS LARRY HIT THE MAN
BOUT 3 TIMES WITH A STILSON WRENCH.
EN I RAN TO THE DOOR TO KEEP A WATCH OUT.
ND NO IDEA THAT THE MAN WAS DEAD.
RRY DRUG THE MAN INTO THE OFFICE.
CATHERED ALL THE GOODIES LARRY TOOK SHIRTS
& PANTS AND HAT'S AND PUT THEM IN A FOOT LOCKER
AS AT THE DOOR WATCHING ALL THIS TIME.
RRY SAID I CAN'T GET THE CASH REGISTER OPEN
I OPENED IT FOR HIM.
THIS TIME I WENT INTO THE OFFICE TO SEE WAS
R ART DEAD BUT HE WAS STILL BREATHING.
I PUT HIS COAT UNDER HIS HEAD.
AND THEN WE LEFT THE SCENE
ARRY CARRIED THE FOOT LOCKER OUT OF THE STORE.
ARRY WENT TO THE LEFT. ON CROSSUS ST.
AND I WENT EAST ON HOWARD AVE. I WAS CARRYING
A BLACK JACKET IN MY HAND WHICH I HAD TOOK FROM
THE STORE.
WE MET BACK AT THE CAR. J.D. WAS STILL IN THE
CAR. LARRY PUT THE FOOTLOCKER IN THE BACK SEAT
OF THE CAR. AND HE SAT IN THE BACK SEAT
I GOT IN THE FRONT SEAT.
I GAVE THE JACKET TO J.D. AND TOLD HIM HE
IS A JACKET.
J.D. DID NOT ASK US WHERE WE HAD BEEN
OR WHERE WE GOT THE THINGS FROM
THE ONLY THING HE SAID WAS WHAT YOU ALL GOT
AND I TOLD HIM TO JUST DRIVE.
WE WENT HOME AND PARKED THE CAR IN FRONT
OF MY HOUSE. WR.

218-2c

'ND LARRY TOOK THE FOOT LOCKER INTO MY OUSE WHEN I OPENED THE CASH REGISTER WE ICH TOOK THE MONEY OUT THAT ABOUT $70.00 IND I GOT ONE SILVER DOLLAR AFTER WE GOT OME WE LAID LOW FOR THE REST OF THE DAY ;11 J.D. GOT WAS THE COAT I GAVE HIM WE ID NOT TELL HIM WHAT WE HAD DONE

HE GUN WAS NOT USED IN THE HOLD UP HAT LARRY HAD JUST THE STILSON WRENCH

W.R.

Willie Reddit

ER STATE THAT I HAVE READ THIS ENTIRE STATEMENT, INITIALED ALL CORRECTIONS, NED THIS STATEMENT IN THE PRESENCE OF THE BELOW LISTED WITNESSES, AND THAT RRECT AND TRUE AS WRITTEN.

ES:

(SIGNATURE) (SIGNATURE)

TLE AND/OR ADDRESS) 4649 Earl Wilson St. (ADDRESS)

(SIGNATURE)

TLE AND/OR ADDRESS)

3C

APPENDIX D

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL DISTRICT

OF HARRISON COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI — PLAINTIFF

VS. — NO. 968

WILLIE REDDIX — DEFENDANT

INSTRUCTION NO. 3

The Court instructs the jury that the killing of a human being without the authority of law by any means or in any manner shall be murder when done without any design to effect death by any person engaged in the commission of any felony other than rape, kidnapping, burglary, arson or robbery, or in any attempt to commit such felony. The Court further instructs the jury that if you believe from the evidence in this case beyond a reasonable doubt, that the Defendant, Willie N. Reddix, in company with another person, went to Art's Levi's in Biloxi, Mississippi, Harrison County, Mississippi, for the purpose of committing the felony offense of shoplifting, and while so engaged in said design the other person hit one Arthur Weinberger in the head with a deadly weapon, with or without the design to effect the death of the said Arthur Weinberger, and as a result of the said blow, the said Arthur Weinberger died, then the jury should find the Defendant guilty of murder.

FILED

This 2 day of Dec 1977

at 11:05 a.m.

W. K. Lee

Circuit Clerk

I Sarah Westbrook

Deputy Clerk

DEF

Appendix D

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL DISTRICT

OF HARRISON COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI — PLAINTIFF

VS. — NO. 968

WILLIE REDDIX — DEFENDANT

INSTRUCTION NO. 6

The Court instructs the jury that when several persons are involved in the perpetration of a crime and one of them commits a fatal act which was a fresh and independent product of the mind of the perpetrator outside of or foreign to the common design, then the others are not criminally liable for the fatal act of the perpetrator. The Court instructs the jury that if you find that there is a reasonable doubt that the fatal act of Larry Jones was a fresh and independent product of his mind outside or foreign to the common design between he and the Defendant, Willie N. Reddix, then you must find the Defendant, Willie N. Reddix, not guilty.

FILED

This 2 day of Dec 1977.

11:05 a.M.

W. R. Lee.

Circuit Clerk

Sarah Westbrook.

Deputy Clerk

GIVEN

REFUSED

APPENDIX E

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS CAUSE NO. 968

WILLIE N. REDDIX

INSTRUCTION NO. S-1

The Court instructs the Jury that the killing of a human being without the authority of law by any means or in any manner shall be Capital Murder when done with any design to effect death by any person engaged in the commission of the crime of robbery. The Court therefore instructs the Jury that if you believe from the evidence in this case beyond a reasonable doubt, that the Defendant, Willie N. Reddix, in company with another person, in the Second Judicial District of Harrison County, Mississippi, on or about the time and date charged and testified about, went to Art's Levi's in Biloxi, Mississippi, and did then and there take the personal property of one Arthur Weinberger, to-wit: clothing and valuables from his business, and against his will by violence to his person, and did then and there rob the said Arthur Weinberger of said personal property, and while so engaged in this design, the said Willie N. Reddix, acting in concert with another, struck the said Arthur Weinberger and killed him with an instrument, to-wit: a wrench, with the formed purpose to effect his death and as a result of said blows to the head, the said Arthur Weinberge died, and said murder was without justification or in necessary self-defense, then the Jury shall find the Defendant guilty of Capital Murder.

FILED

This 8 day of Dec 1977.

at 9:50 A.M.

W. K. Lee

Circuit Clerk

By Sarah Wetherbee

Deputy Clerk

GIVEN REFUSED

JBW

812

1e

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS NO. 968

WILLIE N. REDDIX INSTRUCTION NO. S-2

The Defendant, Willie N. Reddix, has been charged by an indictment with the crime of Capital Murder for having caused the death of Arthur Weinberger, while engaged in the commission of a Robbery upon his person.

If you find from the evidence in this case beyond a reasonable doubt that the Defendant, Willie N. Reddix, was engaged in the criminal act of Robbery and that during the commission of the said Robbery the Defendant acting in concert with another did unlawfully, wilfully, feloniously and of their malice aforethought kill and murder Arthur Weinberger, a living person, and that said killing was done not in necessary self-defense or otherwise justifiable, then you should find the accused guilty of Capital Murder.

FILED

This 7th day of Dec 1977.

at 1:20 P.M.

Wm. A. Lee

Circuit Clerk

By Ollie Fayard

Deputy Clerk

GIVEN REFUSED

JBW

APPENDIX F

IN THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

SECOND JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS CAUSE NO. 968

WILLIE N. REDDIX

SENTENCING HEARING INSTRUCTION NO. S-3

The Court instructs the Jury that before you may return a verdict that the Defendant shall suffer the penalty of death, you must unanimously find in writing that after weighing the mitigating circumstances and the aggravating circumstance, if any, one against the other, that the mitigating circumstances do not outweigh the aggravating circumstances and that the Defendant should suffer the penalty of death.

If your verdict be a unanimous verdict of death, you shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which you unanimously found beyond a reasonable doubt to exist.

In this case the term "Aggravating Circumstances" is limited to the following questions:

1. Was the offense committed while the Defendant was engaged in the commission of the crime of robbery, or in an attempt to commit robbery? Robbery is defined as the felonious taking of the personal property of another, in his presence or from his person and against his will, by violence to his person or by putting such person in fear of some immediate injury to his person. If a person shall design and endeavor to commit an offense, and shall do any overt act toward the commission thereof, but shall fail therein, or shall be prevented from committing the same, then he would be guilty of an attempt to commit the offense.

2. Was the offense especially heinous, atrocious, or cruel?

3. Was the Defendant convicted of a felony involving the use of threat of violence to the person?

In this case the term "Mitigating Circumstances" may be the following:

1. The age of the Defendant at the time of the crime.

2. Any mitigating circumstances or combination of mitigating

umstances surrounding his life and character.

3. Any mitigating circumstances or combination of mitigating umstances surrounding the commission of the offense with which s charged.

If you find from the evidence, beyond a reasonable doubt, that capital offense was committed while the Defendant was engaged, or an accomplice, in an attempt to commit the crime of robbery; that the ense was especially heinous, atrocious and cruel; that the Defendant previously convicted of a felony involving the use or threat of lence to the person; and that the death penalty should be imposed, r verdict shall be written on a separtate piece of paper, shall be ned by your foreman and may be in the following form:

"We, the jury, unanimously find from the evidence and beyond a reasonable doubt that the capital murder in this case was committed while the Defendant was engaged in the commission of the crime of [redacted] robbery; that the capital offense was especially heinous, atrocious and cruel; and that the Defendant has been previously convicted of a felony involving the use or threat of violence to the person.

We further find unanimously from the evidence and beyond a reasonable doubt that after weighing mitigating circumstances and the aggravating circumstances, one against the other, that the mitigating circumstances do not outweigh the aggravating circumstances, and that the Defendant should suffer the penalty of death."

_____
Foreman of the Jury

On the other hand, if you find the Defendant should be sentenced to imprisonment for life in the State Penitentiary, your verdict may be in the following form:

"We, the jury, find in this case that the Defendant should be sentenced to imprisonment for life in the State Penitentiary."

If the jury cannot, within a reasonable time, agree as to the Punishment, the Judge will impose a sentence of imprisonment for life. In such case, you should certify your disagreement in the following form:

"We, the Jury , after due consideration, have been unable to agree upon the punishment and hereby request the Judge to dismiss the jury from

APPENDIX G

CASES DECIDED BY THE MISSISSIPPI SUPREME COURT AFTER JACKSON V. STATE, 337 So.2d 1242 (MISS. 1976).

Bell v. State, 360 So.2d 1206 (Miss. 1978)

Coleman v. State, 378 So.2d 640 (Miss. 1979)

Culberson v. State, 379 So.2d 499 (Miss. 1979)

Gray v. State, 375 So.2d 994 (Miss. 1979)

Irving v. State, 361 So.2d 1360 (Miss. 1978)

Jones v. State, 381 So.2d 983 (Miss. 1980)

Jordan v. State, 365 So.2d 1198 (Miss. 1978)

Nealy v. State, 354 So.2d 788 (Miss. 1978)

Price v. State, 362 So.2d 204 (Miss. 1978)

Reddix v. State, 381 So.2d 999 (Miss. 1980)

Voyles v. State, 362 So.2d 1236 (Miss. 1978)

Washington v. State, 361 So.2d 61 (Miss. 1978)